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NO. 89-1617

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WESLEY P. BERNARD, *et al.*,
Petitioners,

v.

GULF OIL CORPORATION, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM G. DUCK
G. ALAN KRAMER*
MARSHA A. PENN
Chevron Companies
P. O. Box 3725
Houston, Texas 77253-3725
(713) 754-3314

Counsel for Gulf Oil Corporation

*Attorney of Record

CARL A. PARKER
CHRIS PARKS
One Plaza Square
Port Arthur, Texas 77640
(409) 985-8814

Counsel for Oil, Chemical and Atomic Workers International Union - Local No. 4-23

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether this case, on the craft test issues, presents an appropriate vehicle for the resolution of any questions under this Court's decision in *Ward's Cove Packing Co. v. Atonio,* 109 S. Ct. 2115 (1989).

2.* Whether on the seniority system issues, this case is an appropriate vehicle to address any issue of importance under this court's decisions in *Teamsters v. United States,* 431 U.S. 324 (1977), and *Lorance v. AT&T Technologies,* 104 L.Ed.2d 961 (1989).

3.* Whether there is any issue under *Pullman-Standard v. Swint,* 456 U.S. 273 (1982) raised by the fifth circuit's decision regarding Stipulation 29.

4. Whether the fifth circuit's decision conflicts with *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

* We state the questions in the order in which petitioners argued them rather than the order in their statement of the "Questions Presented."

II

GULF OIL CORPORATION'S PARENT COMPANY AND NON-WHOLLY OWNED SUBSIDIARIES

Chevron Corporation - Parent Company

A. K. Chemie G.m.b.H.; Aditivos Mexicanos, S.A. de C.V.; Aircraft Fuel Supply B.V.; American Overseas Petroleum Limited; American Overseas Petroleum (Spain) Limited; Arabian American Oil Company; Associated Octel Company (South Africa) (Proprietary) Limited; Associated Octel Company Limited, The; Associated Octel Company (Plant) Limited; Atlas Supply Company; C-W Properties, Inc.; Calson (Bermuda) Limited; Cansulex Limited; Cansunsulex Limited; Canyon Reef Carriers, Inc.; Chevron Canada Resources Limited; Chevron do Brasil Participacoes e Empreendimentos Ltda.; Coromandel Fertilisers Limited; Dixie Pipeline Company; Explorer Pipeline Company; F C Marine Inc.; Felix Oil Company; Fuel Marine International Ltd.; Glen Park Gas Pipeline Company Limited; Glenwood Properties; Golden Bear Operating Company Limited; Gulf Oil Zaire S.A.R.L.; Hyson (Nigeria) Limited; Internacional de Basicos y Quimicos, S.A. de C.V.; Kenai Pipe Line Company; Later Chemicals Limited; Maasvlakte Olie Terminal N.V.; Mid-Valley Pipeline Company; Nippon Petroleum Detergent Company, Limited; Octel Societe Anonyme; Orogil, S.A.; Orogil, S.A.; Oronite Japan Limited; Paloma Pipe Line Company; Pembroke Capital Company Inc.; Plantation Pipe Line Company; Plastigama S.A.; Platte Pipe Line Company; Refineria Petrolera de Guatemale-California, Inc.; Rimbey Pipe Line Co. Ltd.; Saraco S.A.; Societa Italiana Additivi per Carburanti SpA (S.I.A.C.); Societe Octel-Kuhlman; Solvent Refined Coal International, Inc.; Standard Pacific Gas Line Incorporated; Sultran Ltd.; TAR - Tankanlage Ruemlang A.G.; Trans-Arabian Pipe Line Company; UBAG - Unterflurbetankungsanlage Flughafen Zurich; Valent U.S.A. Corporation; West Texas Gulf Pipe Line Company

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Gulf Oil Corporation, *et al.*, respectfully pray that the petition for writ of certiorari to review the judgments and opinions of the Court of Appeals for the Fifth Circuit be denied.

STATEMENT OF THE CASE

With several exceptions, petitioners' statement of the case is adequate. Initially, the statement that, "The Fifth Circuit reversed, and directed the district court to re-

consider its disposition of a number of the discrimination claims" (Petition, p. 5) is incorrect. The fifth circuit, in fact, affirmed the trial court's disposition regarding Gulf's selection of supervisors and other matters. The court vacated the judgment regarding the seniority system, Stipulation 29 and the testing issues. (129a-130a). Further, the degree of respondents' reliance on *Lorance v. AT&T Technologies* (Petition, p. 5) is exaggerated. *See infra* at pages 25 *et seq.*

In addition, the Court should be advised that a respondent herein, Local No. 4-23 of the Oil, Chemical and Atomic Workers International Union, filed for bankruptcy April 4, 1990, in the United States District Court for the Eastern District of Texas, Beaumont Division, Bankruptcy Case No. 90-10222-S.

STATEMENT OF FACTS

Petitioners' Statement of the Facts contains numerous statements that are argumentative and misleading. Rather than engaging in a tedious point-by-point refutation, we commend the Court to the neutral statement of the facts set forth in the fifth circuit's prior opinions. (4a-10a, 56a-67a, 78a-85a, 95a-97a). Respondents object to petitioners' statement of the facts to the extent that it departs from facts set forth by the court of appeals, which for the most part it purports to track. In addition, certain specific objections are appropriate.

(1) Promotion Tests

Respondents take exception to the statement that "[T]he lower courts found, that the test had an unlawful disparate impact in violation of Title VII." (Petition, p. 11). Petitioners obviously confuse a finding of adverse impact with a finding of illegality. (96a)

(2) Stipulation 29

Beyond the general objections made above, respondents object to petitioners' use of PX87 (Petition, p. 12, n.4 and p. 13) and the arguments arising therefrom, since the trial court specifically granted defendant's motion to exclude that exhibit by order dated February 24, 1986, and this order was upheld by the court of appeals. (54a-55a).

Petitioners' statement of the facts on the issue of the disparate impact of Stipulation 29 is so one-sided as to require balancing. This Court should be aware that the primary negative effect of Stipulation 29 is a highly attenuated possibility of advancement for 18 employees. The only persons affected would be those employees from among the 18 black senior utility men, who would have bid all the way up the craft line of progression, successfully completed the Old Mechanical trainee program and bid into the No. 1 craft jobs. (91a, n. 30 and accompanying text). *See also* the Appendix to the court's opinion at 133a. It is also important to note that the court of appeals determined that Stipulation 29 did not lock blacks out of top positions for 10 years as petitioners had claimed below and re-argue here. (Petition, pp. 12-14).

> Between 1957 and 1984 the Port Arthur refinery experienced a 51% reduction in force, from 5,481 employees in 1957 to 2,872 employees in 1984. During this period, black representation in the work force increased from 16% to 21%. The number of available mechanical training positions and No. 1 craft jobs increased from 490 in 1966 to 764 in 1967 and remained relatively constant thereafter. Therefore, Stipulation 29 actually increased the number of top jobs. It also had the effect of eliminating many intermediate job classifications, thereby making upward mobility to the top craft jobs easier. (93a).

REASONS FOR DENYING THE WRIT

Petitioners recount to some degree the long and arduous history of this case. (Petition, pp. 19-20). We agree that the history of this "aging Title VII case" is relevant to this Court's inquiry, but suggest that the equities it demonstrates and the message it sends are quite different from that implied by petitioners.

Respondents have spent fourteen years of costly litigation defending employment practices that go back decades to a time of major social change at the Port Arthur Refinery and in our society in general. As the district court recognized, this is not a record that demonstrates reluctant compliance with the minimum the law required, but rather one that shows respondents were at the forefront of progressive attempts to correct the racial problems of the past. (148a-150a). Gulf's affirmative action programs; its testing programs and their validation, like this litigation were massive and expensive, and as this record strongly demonstrates, were highly effective.

This is indeed, as petitioners suggest, a case from the past, involving old disputes, which except for this endless litigation, have been largely mooted by history. We believe it is fair to say that this lawsuit, rooted in problems of the sixties and seventies and before, is a poor tool for fashioning the development of Title VII law in the nineties. As will be demonstrated, petitioners' attempt to breathe life into this record, simply doesn't work. It is time for this case to end.

I. THIS CASE, ON THE CRAFT TEST ISSUES, DOES NOT PRESENT AN APPROPRIATE VEHICLE FOR THE RESOLUTION OF ANY QUESTIONS UNDER THIS COURT'S DECISION IN *WARD'S COVE PACKING CO. V. ATONIO*, 109 S. CT. 2115 (1989).

Petitioners' approach to this issue is premised upon a

number of flawed assumptions about this Court's decision in *Ward's Cove Packing Co. v. Atonio,* 109 S. Ct. 2115 (1989); its decisions in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971) and *Albermarle Paper Co. v. Moody,* 422 U.S. 405 (1975) and the development of the law since those seminal cases. Coupling those assumptions with a misapprehension or a mischaracterization of the Fifth Circuit's treatment of these issues, leads petitioners to the creation of a series of problems or conflicts which, while imaginative and superficially compelling, have little connection with reality or this record. We respectfully suggest that petitioners' attempt to create appropriate issues for consideration on certiorari is a house of cards which collapses upon close analysis.

A. This record does not raise significant issues under *Ward's Cove.*

Petitioners' main thrust is that this record presents this Court with an opportunity "not to overturn *Ward's Cove* but merely to explain it." (Petition, p. 22). The primary focus advanced for that need for explanation is this Court's substantive standard announced in *Ward's Cove,* of "whether a challenged practice serves in a significant way the legitimate employment goals of the employer." *Ward's Cove,* 104 L.Ed.2d 733, 752. Petitioners purport to find this phrase not only unique, having "never been utilized by a single lower court decision," but also incomprehensible. (Petition, pp. 22-23).

Semantics aside, we suggest that the basic substantative approach of this Court in *Ward's Cove* did not fall suddenly from the sky. In fact, petitioners needed to go no further in their "orthodox legal research" (*See* Petition, p. 22) to have found a test similar to the *Ward's Cove* test applied by the fifth circuit, in this very case, in its 1988 opinion. *See* 98a *et seq.* Judge Reavley, in that

opinion, took pains to analyze the proper standard and noted as a starting point, well before *Ward's Cove,* that there were two lines of cases interpreting *Griggs* and *Albermarle* on this issue. The first, represented by *Watkins v. Scott Paper Company,* 530 F.2d 1159 (5th Cir. 1976), *cert. denied,* 429 U.S. 861 (1976), essentially required that any selection device be "necessary to the business goals of safety and efficiency. *Id.* at 1168-69 (the business necessity standard)"; the second illustrated by *Contreras v. City of Los Angeles,* 656 F.2d 1267 (9th Cir. 1981), *cert. denied,* 455 U.S. 1021 (1982) which held:

> [T]hat an employer must by professionally accepted measures prove that the test is 'predictive' of or significantly correlated with important elements of work behavior that comprise or are relevant to the job or jobs for which the candidates are being evaluated. *Id.* at 1280 (the significantly correlated standard). (99a).

Judge Reavley opted to apply the *Contreras'* standard rather than the business necessity standard, following *New York City Transit Authority v. Beazer,* 440 U.S. 568 (1979). There, citing *Griggs* and *Albermarle,* this Court noted that even though the nonhiring of methadone users was not required, the employer's goals were significantly served by such a policy and that:

> [T]he record thus demonstrates that TA's rule bears a 'manifest relation to the employment in question'. *Griggs,* 401 U.S. 424 (1971); *Albermarle Paper Co.,* 422 U.S. 405, 425 (1975). (102a-103a).

The *Ward's Cove* standard was not an innovation, nor was the "business necessity" defense the "familiar standard" applied routinely by "federal courts at all levels".

See Petition, p. 24.[1] Justice O'Connor's plurality opinion in *Watson v. Fort Worth Bank & Trust,* 101 L.Ed.2d 827, 847 (1988) foreshadowed the present Court's interpretation of "business necessity" or "job relatedness" as premised upon the "manifest relationship to the employment in question" aspect of *Griggs,* but noted that:

> [S]uch a formulation should not be interpreted as implying that the ultimate burden of proof can be shifted to the defendant. On the contrary, the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times. *Id.*

We suggest that there is no mystery whatever about the standard ultimately applied in *Ward's Cove.* It was an evolution directly from *Griggs* itself and was the rejection of the theory of those cases which had applied the strict "business necessity" standard. That *Ward's Cove* ultimately resolved the ambiguity in *Griggs* is not a new departure but a choice between two legitimate and longstanding interpretations of that precedent.

Significantly, the court of appeals, in its 1989 opinion (31a-32a), did not cite *Ward's Cove* on the issue of "standard" but rather applied the same "significantly correlated" standard that had been utilized in that court's 1988 opinion. (100a-105a). It is particularly surprising that petitioners suggest that *Ward's Cove* has been read by the fifth circuit as "virtually eviscerating *Griggs* and *Albermarle*" *See* Petition, p. 24. In fact, if there is any ambiguity in the *Ward's Cove* standard, the court of

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1. Compare *New York Transit Authority v. Beazer,* 440 U.S. 568 (1979) and *Washington v. Davis,* 426 U.S. 229 (1976), with *Dothard v. Rawlinson,* 433 U.S. 321, 332 n. 14, 97 S. Ct. 2720, 2728, n. 14 (1977).

appeals in this case came down squarely in line with existing pre-*Ward's Cove* precedent.[2] Therefore, to suggest that *Bernard* is an appropriate vehicle to explore the limits of the standard enunciated in *Ward's Cove* is absurd, as is the suggestion that somehow *Bernard* conflicts on this issue with *Griggs* and *Albermarle* in a way that was not harmonized and resolved by *Ward's Cove.*

The real departure *Ward's Cove* made from precedent can be argued to be on the question of burden of persuasion vs. burden of production. *See Ward's Cove v. Atonio,* 104 L.Ed.2d 733, at 753. We respectfully suggest that if the allocation of burdens cannot be squared between *Griggs* and *Ward's Cove,* that petitioners' argument is with Justice White and the majority in *Ward's Cove* rather than with Judge Higginbotham in *Bernard.* Petitioners may well object to this allocation of burdens, however, that is certainly no foundation for a suggestion that *Ward's Cove* should be "explained" on this issue in this case. There is nothing obscure about the allocation of burdens. The Court in *Ward's Cove* itself noted:

> [T]his rule conforms with the usual method of allocating persuasion and production burdens in the federal court. *See* Fed. R. Evid. 301, and more specifically it conforms to the rule in disparate treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration. *Ward's Cove,* 104 L.Ed.2d at 753. (Citations omitted).

In summary, petitioners' claim that the *Ward's Cove* standard is obscure is unwarranted.[3] The suggestion that

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2. See *Albermarle Paper Co. v. Moody,* 422 U.S. 405 at 431.

3. Cases which decided post-*Ward's Cove* have had no discernible problem in applying it. See *Allen v. Seidman,* 881 F.2d at 377 (7th Cir. 1989); *Evans v. City of Evanston,* 881 F.2d at 383 (7th Cir.

the burden of proof needs substantial explanation really does not rise to the level of serious argument.

B. *Bernard* does not significantly conflict with *Griggs* or *Albermarle* on test construction or validation.

Petitioners' argument goes on to assume a fundamental conflict between the *Bernard* decision and *Griggs* and *Albermarle* on test validation. Apparently exercising clairvoyant powers, petitioners tell this Court that the:

> Fifth Circuit had no doubt that *Ward's Cove* required it to sustain in this case tests that combine the very characteristics that had led this Court to condemn the tests at issue in *Griggs* and *Albermarle*. . . . (Petition, pp. 24 & 25).

This is puzzling, given the lack of reliance on *Ward's Cove* by the fifth circuit in its 1989 opinion,[4] and the fact that substantial testing issues were decided in 1988 prior to *Ward's Cove*. (111a *et seq.*). Petitioners' attempt to target *Ward's Cove* as the source of the fifth circuit opinions in this regard is as transparently opportunistic as it is at variance with the fifth circuit's express opinions.

1989); *Mallory v. Booth Refrigeration*, 882 F.2d 908, 912 (4th Cir. 1989); *Rendon v. AT&T Technologies*, 833 F.2d 388, 390 (5th Cir. 1989); *International Union v. State of Michigan*, 886 F.2d 766, 770 (6th Cir. 1989); *Hill v. Seaboard*, 885 F.2d 804, 811 (11th Cir. 1989); *International Union v. Johnson Controls, Inc.*, 886 F.2d 871, 887 (7th Cir. 1989); *Green v. USX*, 52 FEP Cas. 168 (3rd Cir. 1990); *Lowe v. Commack Union Free School District*, 886 F.2d 1364, 1369 (2nd Cir. 1989); *Bertek v. Urban Redevelopment*, 882 F.2d 739, 742 (3rd Cir. 1989); *Bruno v. W. B. Saunders Co.*, 882 F.2d 760 (3rd Cir. 1989); *Williams v. Giant Eagle Markets Inc.*, 883 F.2d 1184, 1192 (3rd Cir. 1989); *Edwards v. Johnston County Health Department*, 885 F.2d 1215, 1233 (4th Cir. 1989); *Gagné v. Northwestern National Insurance Co.*, 881 F.2d 309 (6th Cir. 1989); and *United States v. State of Louisiana*, 718 F. Supp. 525, 532 (D.C. La. 1989).

4. In this regard, it should be noted that *Ward's Cove* was relied upon in the testing context on the issue of the standard for a lesser disparate alternative. (33a)

Beyond that, the class' assumption of a clear conflict between the fifth circuit in this case and *Griggs* and *Albermarle* is simply not supportable. Petitioners parade a series of supposed parallels between the factual situation in *Griggs* and *Albermarle* and the factual situation before the court in *Bernard* and build a conclusion of inconsistency. (Petition, pp. 24-42). This misses the point of the job relatedness validation process. It is very fact and context specific. As stated in *Albermarle*: "the question of job relatedness must be viewed in the context of the plant's operation and the history of the testing program." *Id.* at 427. It must also be viewed in the context of the validation study actually performed in each case. We are dealing here with the evaluation of tools used to determine job relatedness. These are not constants. The upholding of the Wonderlic personnel tests as valid in one context is not transferrable, just as those tests are not *malum in se* because they didn't pass muster in *Griggs* or *Albermarle*. As the court in *Griggs* was careful to state:

> *On the record before us* neither the high school completion requirement nor the general intelligence test be shown to bear a demonstrable relationship to the successful performance of the jobs for which it was used. Both were adopted, as the court of appeals noted, without meaningful study of their relationship to job performance ability. *Griggs*, 401 U.S. at 431, *emphasis supplied.*

Griggs was decided in 1971, and while that decision created employer sensitivity to the need for validation studies, there was no study at all in *Griggs*. In *Albermarle* the study was much too little too late:

> After this Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *on the eve of trial, Albermarle* engaged an industrial psychologist to study the 'job relatedness' of its testing program. *Id.* at 411, *emphasis supplied.*

That the validation study conducted under these circumstances was flawed is hardly surprising. The Court noted that as to the Wonderlic tests "the company made no attempt to validate the tests for job relatedness . . ." *Id.* at 428.

As to the other tests involved in *Albermarle*, there was really no record of validation except for vague recollections by plant officials. The court noted, "Job relatedness cannot be proved through vague and unsubstantiated hearsay." *Id.* at 428 n. 23. The Court pointed out that:

> Jobs were grouped together solely by their proximity in the line of progression; no attempt was made to analyze jobs in terms of the particular skills they might require. *Id.* at 430.[5]

The records in *Griggs* and *Albermarle* stand in stark contrast to the record here. The superficial similarities to the defects there were explained and clarified by competent expert testimony which made it clear that here these were not defects at all, but rather natural adjustments to the mathematical rules that govern the sophisticated use of statistical analysis. (28a-29a). As the court of appeals noted, this record is quite a different matter.

> In the face of statistically significant correlations, professional test construction, commonality of abilities associated with the various jobs at issue, the 'path analysis' correlations of the Old and New Tests, and the supporting expert opinion based upon massive validation studies of similar tests in the industry, this

5. Justice Stewart recognized the validation study attempted by the employer in *Albermarle* was doomed to failure in refusing to uphold the outright reversal of the district court by the court of appeals, because that implied that an injunction should immediately issue against all testing at the plant. The court recognized the employer in its validation process, had been without appropriate guidelines and that that process was in its infancy. "The appropriate standard of proof of job relatedness has not been clarified until today." *Id.*

> court will refrain from making business decisions for an employer when it is not clearly erroneous that its promotion practice is validly job related. (35a, 153a-173a).

1. Gulf's tests "measured the person for the job".

Petitioners argue that the *Griggs* requirement that any selection device "must measure the person for the job and not the person in abstract," has not been met. 401 U.S. at 436 (Petition, p. 30). Petitioners' argument is essentially with the "performance elements" used by supervisors to evaluate the job performance of incumbent employees in the pipefitting and boilermaking departments. (108a, n.5). In essence, petitioners argue for a one dimensional test based upon "duty elements" rather than tests relating to the "ability elements" which, in fact, were the focus of the criterion development. (109a). Petitioners apparently would have the tests begin and end with a carpenter sawing a straight line in hot temperatures—at heights! (Petition, pp. 30-31). The court of appeals supported the trial court's rejection of this approach:

> The district court found that the criteria employed by RBH (the consulting firm employed) accurately reflected the important elements that comprised the jobs studied. The court noted that 'about one-half of [Gulf's] criteria are actual duty elements of the same character of plaintiffs'. In reaching its conclusion, the court emphasized that the positions for which adequate test performance was a prerequisite required certain cognitive abilities and that performance on tests which were designed to correlate solely with the duty elements would be a poor predictor of job performnace.

The court of appeals went on to hold that the "criteria used to evaluate job performance consisted of important elements relevant to the job studied," noting that:

> Upon successful completion of a training program an employee promotes to the top position for which he has trained. Gulf's proof supports the conclusion that the possession of certain cognitive abilities is important to success as a trainee and a craftsman. (111a-112a; 235a-237a).

Petitioners' argument goes beyond fair comment when it states:

> The district court expressly held that black workers who failed the disputed test in large numbers, generally had the abilities and experience required to carry out the duties of craftsmen. (Petition, pp. 31-32).

On the contrary, the district court found that some of the labor group had experience in the "handling of tools and materials"; relevant to some of plaintiffs' proposed "duty elements." (237a). These "duty elements" measured "only the abilities to perform the actual duties of the lowest craft job." (235a, n. 6). The trial court's express position was that such experience was useless to predict which workers in the labor group had potential for promotion. (236a-238a). Relevant testing is not concerned with the purely physical ability to handle "tools and materials" rather it involves the ability to make and implement responsible decisions in the intense and dangerous context of a working refinery.[6]

The court of appeals correctly distinguished *Albermarle* noting:

> In *Albermarle* the tests were not found to be job related because 'no attempt was made to analyze jobs in terms of the particular skills they might require.' Here, the jobs were all analyzed in terms of particular skills and the test studies were conducted accordingly. (29a-30a).

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6. Petitioners' further argument that "Gulf offered an ingeniously circular form of validity study" (Petition, p. 32), is a total distortion of the record and the methodology employed in the testing program. (108a-110a)

2. The New Tests were properly validated.

Petitioners mischaracterize the action of the courts below regarding the correlation co-efficients developed for the New Tests. (Petition, p. 39).[7] Petitioners further claim that the district court felt it was "obligated to sustain the tests in light of the new 'rather lighter' standard of business justification in *Watson* . . ." (Petition, p. 39), is belied by the fact that the district court also expressly decided the case on the basis of the pre-*Watson* burden of persuasion standard and found that that stricter standard had also been met. (193a).

Petitioners distort the impact of *Ward's Cove* and *Watson* upon the 1989 opinion of the fifth circuit because they apparently misunderstand the meaning and scope of the original remand in 1988. The basis of the remand on this issue of the correlation co-efficients was not a search for "magic" numbers or a reconciliation of conflicts, but rather an attempt to understand "the basis for the district court's holding that the tests are job related." (115a). In its 1989 opinion, speaking of its earlier decision, the court so stated: "This court found no way to determine the basis for the district court's holding, however, so remanded for further findings . . ." (28a). The 1989 court clearly did not, as petitioners allege, no longer think this issue important, "sustaining the tests without bothering to decide how often test scores correlated with job performance." (Petition, p. 41). Rather, as to the boilermakers and pipefitters, now having the needed findings of fact, the court held that, "The district court was not clearly erroneous and its findings are supported by the expert testimony in the record." (29a).[8]

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7. The apples and oranges nature of any comparison between the *Bernard* studies and the "study" done in *Albermarle* have already been discussed. See above Pages 9-12.

8. The study showed that performance on the New Tests correlated .32 with job performance as a boilermaker, and .22 with

Petitioners attack the validity studies stating:

> This is precisely the sort of crazy quilt pattern which *Albermarle* insisted would preclude inferring that a test was valid for a job which had not been studied, or regarding which a study had shown no correlation. (Petition, p. 36).

The path analysis, here, was supported by competent expert testimony as to mathematical similarity coefficients. (153a-168a). Such a comparison of abilities had not been attempted, let alone demonstrated in *Albermarle*. It was sufficient here "to generalize the validity of the new tests from boilermakers and pipefittters to craft jobs involving similar abilities." (30a). Here as elsewhere, petitioners confuse the "duty elements" with the "ability elements" which were the focus of the extension to the other crafts involved. The class attempts to undermine this extrapolation by saying that no study was done to show that painters, carpenters, pipefitters and laboratory technicians do essentially the same thing. (Petition, pp. 35-36). However, it is not the nature of the duties that control this analysis but the nature of the abilities and skills necessary to do the jobs involved. (30a-32a).

Despite the exhaustive nature of the studies performed, the tests could not be validated as to all jobs involved. (107a; 153a *et seq.*). Where numbers or other statistical or test construction problems prevented the achieving of

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performance as pipefitter, and that these correlations are both statistically significant.

Although the unadjusted correlations are statistically significant, the adjusted figures, which are even higher than unadjusted, are better estimates of validity, and even they underestimate the true validity of the New Tests.

The testimony of Gulf's expert witnesses was convincing, and they adequately explained, based upon research and their past experience, why the tests were job related, why the correlation coefficients resulting from the study needed to be adjusted for various factors, and why these adjusted figures were more accurate. (28a-29a).

accurate results,[9] the 1988 court had invited the district court to consider an approach using similarity between pairs of jobs to generalize the validity of the New Tests from the boilermakers and pipefitters to other jobs involving similar abilities. The court specifically invited the use of "similarity co-efficients." (116a, n. 54). The development of the need for and results of this analysis are set forth in detail in the trial court's findings of fact. (156a-168a). Grounded upon this solid expert testimony and appropriate precedent (30a), district court's findings were not only not clearly erroneous but were the only findings reasonably drawn from the validation studies.

3. Path analysis properly validated the Old Tests.

Regarding the Old Tests and the path analysis that was used to validate those tests, petitioners again resurrect the ghost of the flawed validity tests in *Albermarle* and focus on the fact that the specific parts of the Old Tests and New Tests were not, in fact, identical. (Petition, p. 37). Again, they neglect to deal with the foundation for that path analysis provided by competent expert testimony.

The methodology of the path analysis employed by Gulf's experts, in essence, established the validity of the old tests by multiplying the correlation coefficient between the old and new tests and the relevant new test correlation coefficient for each job category. The initial correlation coefficient was arrived at by comparing the test scores on the Old Tests and the New Tests for the group of indi-

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9. Petitioners repeatedly confuse the invalidity of a test with the inability to validate a test. Inability to validate does not mean the test is invalid. It only means that because of the sample size, some other statistical shortcoming or some contaminate, accurate data is not available. (157a *et seq.*) (See for instance petitioners' discussion of welders, (Petition, p. 40) and petitioners' misleading claim that Gulf knew certain of its tests might not be valid based upon the letter reflected at Page 38, n. 17 of the petition).

viduals who had actually taken both tests. The correlation coefficient between the test batteries was measured at .72. (DX. 127; T1070-1074, 1134-1135. DX. 128; T1073-1074, T1134-1135, T1356-1357, T1381-1382). This technique gives an estimate of the Old Test validity which is an absolute minimum. (T1072, T1382). The Old Tests were found to validly predict performance in the jobs for which they were used. (T1073, 1357). Furthermore, the path analysis was not challenged by petitioners' testing expert or statistician. Gulf's experts supplied the only evidence in the record on the validity of the Old Tests.

Petitioners now contend that the two sets of tests could not have been similar because the content of the tests was different. (Petition, p. 37). This is a classic *non sequitur*. The similarity coefficient of .72 between the tests makes that clear. Petitioners' logic would, we suggest, conclude that the readings of farenheit and centigrade thermometers cannot be said to measure the same thing because of their different scales.

Petitioners also claim that it is "undisputed that the Old Tests were scored far more stringently than the New Tests . . ." (Petition, p. 37). Nothing in the record supports that claim. It is not clear whether petitioners are here talking about the existence of cutoff scores. If that is their argument, it doesn't work, since there is no evidence in the record that there were cutoff scores. As the court of appeals determined:

> From 1947 to 1971 the 'Old Tests' were used to screen bidders and since 1971 the 'New Tests' have been administered. Gulf considered test results along with other qualifications to determine whether senior bidders would be awarded trainee positions; *no cut off scores were used. Bernard,* 841 F.2d at 561 (*emphasis added*), (95a-96a).

Petitioners' use of rejection data is simply irrelevant to the question once the nature of the process of selection is understood.

4. There is no conflict with *Griggs* or *Albermarle* regarding the "good faith standard" since such standard was never used.

At Pages 41 and 42 of the Petition, petitioners make a puzzling argument. They opine that, "The panel read *Watson* in particular to require federal courts to attach heavy weight to the mere fact that an employer believed in good faith that its tests were job related," and go on to argue the fifth circuit, apparently contrary to *Griggs* and *Albermarle,* "construed *Watson* to hold, such a good faith belief can defeat a disparate impact claim . . ." and, therefore, *"Griggs* and its progeny have collapsed back into the requirement that a Title VII plaintiff prove discriminatory intent." There follows the proposition that certiorari should be granted "to resolve whether, as the courts below concluded, *Ward's Cove* and *Watson* have largely eviscerated *Griggs* and *Albermarle."* (Petition, p. 42). One struggles in vain to find the slightest support for the position that Judge Higginbotham read a good faith standard into this issue. The court said:

> This court will refrain from making business decisions for an employer when it is not clearly erroneous and, its promotion practices validly job related. '[I]t must be borne in mind that [c]ourts are generally less competent than employers to restructure business practices and unless mandated to do so by congress they should not attempt it. *Watson v. Fort Worth Bank & Trust,* 108 S. Ct. 2777, 2791 (1988), quoting *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 578 (1978), (35a).

This is but one more example of petitioners' repeated attempts to manufacture an issue for certiorari which

simply does not exist on this record. It is obvious that the court of appeals and the *Watson* and *Furnco* courts were speaking not about "good faith"[10] but rather were addressing an issue of judicial restraint and the proper role of the judiciary in the complex and troublesome area of the work place.

Conclusion

There is no basis for viewing this case as appropriate to raise serious issues under *Ward's Cove, Griggs* or *Albermarle*. This record, massive and complex as it may be, simply does not present a close case.

Far from reaching the "definite and firm conviction" that the trial court's findings were not "plasible in light of the record viewed in its entirety." *Anderson v. City of Bessemer,* N.C. 470 U.S. 564, 573-74 (1985), a review of the district court's findings and the relevant portions of the record[11] would lead an objective analyst to conclude that these tests significantly advanced legitimate employment goals. The uncontroverted evidence in the trial court demonstrated that the tests also had a sizeable economic benefit, calculated to result in savings of $25,000,000. (T1360, 1362 and DX. 139, p. 2, T1359-1361). This analysis, compelling as it was, included only economic variables and not the additional intangible, but no less real, costs associated with failure, such as increased risk of catastrophic accidents, morale considerations incident to retraining and return to other jobs, etc.

As alluded to by the Supreme Court in *Ward's Cove Packing Co. v. Atonio,* 109 S. Ct. 2115, 2120 n.4 (1989), when dealing with disparate impact cases, one should bear in mind that there is demonstrably no intent to discrimi-

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10. *Cf. Griggs,* 401 U.S. at 432.

11. (151a-172a) and T1033-35, T1037-39, T1051-53, T1070, T1073-74, T1138-41, T1330-33, T1340-47, T1354-59.

nate (otherwise it would not even be necessary to reach the disparate impact question).[12] Testing is not a *malum in se*. In fact, when implemented properly, testing is anti-discriminatory because it renders impossible the operation of individual bias. The overwhelming evidence of the years of test development and its attendant expense, job analysis, and the emphasis placed upon qualification and training for these critical refinery jobs is consistent with an employer undertaking to achieve important business goals.

It is futher useful to recognize that the harm attributable to the tests consisted of the opportunity to train for approximately thirty jobs over a twelve year period (152a-168a), as compared to benefits measured in the tens of millions (DX 139). Respondents do not contend these facts would justify an otherwise illegal policy, but they are relevant to the statement of this Court in *Ward's Cove* that "a mere insubstantial justification of a business practice will not suffice." 109 S. Ct. 2126. This was the pre-*Ward's Cove* law as well. *See New York City Transit Authority v. Beazer,* 404 U.S. at 586-587 n. 31 (1979).

We respectfully submit that the findings of fact of the district court on the testing issues were not clearly erroneous as the court of appeals properly found, but rather were compelled by this record. Further, the standards employed by the court of appeals in reviewing this record were entirely consistent with relevant decisions of this Court. Petitioners' attempt to rewrite the history of this case, those findings, the court of appeals' opinions and relevant precedent to create issues which they perceive as appealing for a grant of certiorari should be recognized for what it is and treated accordingly.

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12. The trial court and the court of appeals found no disparate treatment (i.e. intentional discrimination) in the facet of employment most commonly subject to attack on that basis, promotion to supervisor. 861 F.2d 569.

II. ON THE SENIORITY SYSTEM ISSUES, THIS CASE IS NOT AN APPROPRIATE VEHICLE TO ADDRESS ANY ISSUE OF IMPORTANCE UNDER THIS COURT'S DECISIONS IN *TEAMSTERS V. UNITED STATES*, 431 U.S. 324 (1977), AND *LORANCE V. AT&T TECHNOLOGIES*, 104 L.Ed.2d 961 (1989).

Petitioners' argument here, as their statement of the issue involved indicates, is again premised upon a series of assumptions. (Petition, p. 42). The first assumption is that the decision below conflicts with *Teamsters v. United States,* 431 U.S. 324 (1977). Petitioners leap from that assumption to the assumption that an issue is raised as to whether or not that "conflict" was compelled by *Lorance v. AT&T Technologies,* 104 L.Ed.2d 961 (1989). Just as in the testing issues, petitioners attempt to assume this case into a posture which it simply does not have. The demonstration of that proposition requires only the examination of the purported foundation for those assumptions.

Petitioners' basic argument is premised upon the assumption that the court of appeals in this case found discriminatory genesis to be "legally irrelevant." (Petition, pp. 46-48). Such a position, petitioners argue, is directly contrary to *Teamsters* and its progeny. We are constrained by Supreme Court Rule No. 15.1 to point out that this assertion by petitioners is at variance with the record. The court of appeals did indicate in its 1988 opinion that it inferred "discriminatory intent from Gulf's pre-act seniority system . . ." (76a). However, it never concluded that the system had its genesis in racial discrimination. Rather the court of appeals had decided the district court's finding on genesis was not clearly erroneous, despite the fact that it could infer some discriminatory

intent. The scope of the remand, makes that clear.[13] Any uncertainty petitioners may have had on this issue, was decisively clarified in the court's 1989 opinion where, after setting out the *James* factors, Judge Higginbotham unequivocally stated:

> This court [in 1988] found the first three of the factors in favor of defendants, but remanded to the district court to consider whether Stipulation 29 showed the system had been maintained with a discriminatory purpose. (16a-17a).

The third factor of course, is "whether the seniority system had its genesis in racial discrimination." (16a). Petitioners never mention this holding, but proceed to construct a hypothetical case for this Court's consideration. We respectfully suggest petitioners' "issue" regarding a conflict with *Teamsters,* because of a holding that genesis was legally irrelevant, is most charitably described as a "non-issue," since there was never a finding of genesis in the first place.[14]

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13. Relying on *James v. Stockham Valves & Fitting Co.,* 559 F.2d 310 (5th Cir. 1977), the district court had found specifically that . . . "[U]nder *James* Factor No. 3, Gulf's seniority system did not have its genesis in racial discrimination." (227a). In *Pullman-Standard v. Swint,* 456 U.S. 273 (1982) the district court, applying the *James* standards, found no discriminatory purpose in the seniority system involved, and held it to be *bona fide.* The fifth circuit, also applying the *James* standards, reversed and concluded that the seniority system did result from an intent to discriminate. This Court held "discriminatory intent here means actual motive; it is not a legal presumption to be drawn from a factual showing of something less than actual motive." Thus a court of appeals may only reverse a district court's finding on discriminatory intent if it concludes that that finding is clearly erroneous under Rule 52a. *Pullman-Standard,* 456 U.S. 289-290.

14. It is frankly tempting to go further and engage petitioners on the ground they choose in their hypothetical. Even had there been a finding of genesis, petitioners' second assumption that the court of appeals suggested it was legally irrelevant, is likewise inaccurate. The suggestion of the court was that it would not be controlling if it were the sole factor met in the *James* scenario. That is totally in accord with existing law. Research discloses no case which has ever

The fact that the court of appeals inferred pre-Act discriminatory intent carries petitioners no further. Beyond the fact that the court of appeals did not overturn the trial court's finding on this issue,[15] it is clear that the rules from which the court inferred discriminatory intent were no longer a part of the system being implemented. (75a-76a). The tools of discrimination had been discarded long before and the fact that the effects of that discrimination were locked in by a neutral seniority system is precisely what *Teamsters* addressed and permitted under Title VII. *Teamsters,* 431 U.S. at 353.

Petitioners miss the message of *Teamsters* entirely, in arguing that "a pre-Act seniority system which discriminated will make an otherwise *bona fide* post-Act seniority system illegal." (Petition, p. 48). The court of appeals was correct and consistent in citing *Teamsters* for the proposition that a "seniority system does not become illegal 'simply because it allows the full exercise of the pre-Act seniority rights of employees of a company that discriminates before Title VII was enacted'." (12a—quoting *Teamsters,* 431 U.S. at 353); *See also United Airlines v. Evans,* 431 U.S. 553, 558. The crux of the matter is that in *Teamsters* and every major case construing it, the existence of pre-Act discrimination was the starting point for analysis rather than the conclusion, as petitioners seem to believe.

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held that the meeting of one of the *James* factors in isolation is sufficient to render a seniority system non-bona fide. In *Larkin v. Pullman-Standard Division, Pullman, Inc.,* 854 F.2d 1549, 1577-78 (11th Cir. 1988), the court held that the finding of genesis is not sufficient, standing alone to render a system non-bona fide. That issue, however, is not properly raised on this record.

15. The district court made no finding of discriminatory intent; therefore, the statements of the court of appeals in its 1988 opinion on this issue should be construed consistently with *Pullman-Standard v. Swint,* to be a part of the court's discussion determining that the trial court's genesis finding was not clearly erroneous rather than constituting a separate holding. *See* Footnote 13.

Petitioners suggest a conflict between *Teamsters* and this Court's recent decision in *Lorance v. AT&T Technologies,* 104 L.Ed.2d 961 (1989) and strive mightily to give this Court the impression that respondents "relied in particular on the recent decision" in *Lorance* and ". . . the fifth circuit embraced that view of section 703(h), reiterating that pre-Act discrimination in the creation of a seniority system was in its view legally irrelevant." (Petition, pp. 47-48).

Respondents' reliance on *Lorance* had absolutely nothing to do with the issue petitioners are raising here. *Lorance* was cited for the proposition that plaintiffs' proof of intentional discriminatory adoption of a seniority system was an "element of any Title VII action challenging a seniority system rather than an affirmative defense", and the "fact that a seniority system had a discriminatory impact is not alone sufficient to invalidate the system . . ." (Appellees' Supplemental Brief, No. 88-6141 (5th Cir.) pp. 12-13).

The court of appeals, far from embracing any view relating to pre-Act discrimination based on *Lorance, did not cite Lorance at all!* In fact, the only relevant decision was made by the court of appeals in 1988, before *Lorance* was decided. In 1989, the Court summarily dismissed this issue—"This contention [that a pre-act seniority system which discriminated will make an otherwise bona fide post-act seniority system illegal] was rejected in our earlier opinion . . ." (11a-12a). The mystery of *Lorance's* claimed impact on the *Bernard* court and its supposed conflict with *Teamsters* and its progeny, is heightened by petitioners' suggestion that the *Lorance* court, in holding that the charge in that case was untimely, utilized "language which could conceivably be construed to call into question this aspect of *Teamsters, Bazemore v. Fri-*

day, 478 U.S. 385 (1986)[16] and *American Tobacco Co. v. Patterson*, 456 U.S. 63 (1982)." (Petition, p. 49). At peril of appearing unimaginative, we must confess that after repeated readings of *Lorance*, we cannot solve the puzzle of what language petitioners reference. (Perhaps significantly they fail to cite to the opinion.) We respectfully suggest that *Lorance* does not address the issue petitioners raise and this represents yet another example of the invention of an issue which simply does not arise either from this record or from the precedent petitioners invoke.

III. THE FIFTH CIRCUIT'S DECISION REGARDING STIPULATION 29 DOES NOT RAISE ANY ISSUE UNDER *PULLMAN-STANDARD V. SWINT*, 456 U.S. 273 (1982).

Petitioners here, again, take their own misunderstanding of the record and torture it into a "conflict" with existing precedent. Initially, petitioners represent to this Court that the district court's finding that Stipulation 29 altered lines of progression and increased productivity, was so "palpably false" that its "correctness . . . is not seriously at issue . . ." (Petition, pp. 51-52). Petitioners state, "In the subsequent appeal, respondents declined to defend or refer to this mistaken finding and the Fifth Circuit properly did not credit it." *Id.* at 52. These statements are plainly and simply a misrepresentation of the record. The multiple findings of fact (rather than finding)[17] that petitioners purport to summarize were aggressively and re-

16. Petitioners' use of *Bazemore*, at pages 44 and 45 of the petition is troubling. It should be noted that the case has absolutely nothing to do with seniority systems or § 703(h) but rather related to salary disparities created prior to coverage of the federal employer involved under Title VII and their perpetuation after employer became covered by Title VII. *See id.* at 395. (Brennan J. concurring in part)

17. *See* (139a-147a).

peatedly defended by respondents.[18] Rather than failing to credit these findings, the fifth circuit specifically addressed the same arguments petitioners are making here:

> Plaintiffs contend that the district court misunderstood the import of Stipulation 29, that it was not a measure designed to change lines of progression but simply the promotion of 203 mostly white craft helpers. Plaintiffs go too far in simplifying Stipulation 29: it cannot be observed in isolation, but must be considered in the context of Gulf's reorganization. The district court found that Gulf wanted to simplify the lines of progression through reorganizing, and wanted to increase the number of craft trainees, leading to an increase in a number of persons who were trained to handle all aspects of a craft. (21a) *See also Bernard,* 841 F.2d at 557, 559 and 571, (77a, 85a-88a, 133a).

The court recognized that while the terms of Stipulation 29 did not expressly state the job classifications would be eliminated or lines of progression altered, Stipulation 29's implementation achieved precisely that result. By providing employees within the craft helper classification the opportunity to enter special training programs to become mechanic trainees, Stipulation 29 effectively eliminated the craft helper classifications which, in turn, simplified the lines of progression.

Having established a completely illusory foundation, petitioners then proceed to leap from it to the conclusion that the fifth circuit made an independent finding of fact contrary to *Pullman-Standard v. Swint,* 456 U.S. 273 (1982). They represent that finding to be that: "Gulf . . . wanted to increase the number of craft trainees." (Petition, pp. 53-54). It is significant that there is more

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18. *See* Brief of Appellee' pp. 8-9. *See also* Appellees' Supplemental Brief, pp. 4, *et seq.;* Appellees' Reply to Appellants' Supplemental Brief, pp. 6-7.

to that sentence than petitioners quote. The important remainder of the sentence was "leading to an increase in the number of persons who were trained to handle all aspects of a craft." (21a). We submit that in no reasonable way can this be viewed as a new finding of fact. It was simply an accurate summary of the trial court's findings of fact. The full refutation of petitioners' argument requires only a cursory review of the relevant portions of the record.

Petitioners go on to rest their argument on the fact that "Gulf's own witnesses uniformly insisted that the company had too many employees" and that "Gulf's major labor problem in this era was a *surplus* of inefficiently used employees . . ." (Petition, pp. 54-55). All that is true. In fact, that is the factual background which as the district court indicated, spawned Stipulation 29. (139a-147a).

The primary purpose of Stipulation 29 was to eliminate just that "surplus of inefficiently used employees." The implementation of Stipulation 29 dramatically reduced the number of workers required to perform a given job, partly because the top craftsman was able and was permitted to do the work assignments previously reserved to the craft helpers. The impact of this change is graphically demonstrated by defendants' Exhibit 88, which has been attached in the appendix to this brief. This exhibit prepared by Dr. Fox, defendants' industrial organization expert, shows that Stipulation 29 could reduce the crew required to do a standard job from nine workers to three. (T675A-676A). Once this is understood, the cost effectiveness purpose of the "universal mechanic" becomes obvious as does the economic imperative behind Stipulation 29.

Again, petitioners attempt the creation of an issue for certiorari. The relevant findings were properly made by the trial court and endorsed by the court of appeals. There

is no issue under *Pullman-Standard v. Swint,* 456 U.S. 273 (1982).

IV. THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH *TEXAS DEPARTMENT OF COMMUNITY AFFAIRS V. BURDINE,* 450 U.S. 248 (1981).

The court of appeals directly met the argument that Gulf's reason for not promoting Mr. Hayes or Mr. Brown was only asserted through arguments of counsel. It stated:

> The issue was not merely raised in the arguments of counsel, . . . for there is ample evidence in the record to support the district court's finding:
>
> 1. Mr. Hayes and Mr. Brown each testified that they had told no one in authority of their interest in becoming supervisors;
> 2. Mr. Draper testified that employees were invited to inform supervisors of their interest in promotion;
> 3. There was no evidence that all employees wanted to become supervisors; and
> 4. Mr. Brown's testimony indicated he knew how to express interest but he chose to remain silent. (40a).

It is difficult to define the parameters of petitioners' argument, but they do not dispute there was evidence in the record from which the findings of fact of the trial court resulted. Apparently, they suggest a new rule of law which would permit a trial court's finding to be held clearly erroneous, despite the presence of substantial supporting evidence, on the basis that no reason was specifically labeled as the reason for the employer's decision. Beyond being a remarkable exception to normal standards for applying Rule 52, the principle that petitioners attempt to extract from *Burdine* has little to do with *Bur-*

dine or this record. The district court found the record clearly spoke for itself regarding the reasons for non-selection. (173a-178a); (247a-252a). The failure of Mr. Hayes and Mr. Brown to express an interest resulted in the decisional process never being triggered. Under such circumstances, it is illogical to require Gulf to produce a witness to articulate the reason for its decision where the record shows clearly that there was no decision made—Gulf simply did not know the petitioners were interested. *See* 172a-178a; 203a.

Further as the court of appeals noted, petitioners mistake the mandate of *Burdine*:

> In meeting its burden of production, Gulf did not have to prove what its reasons were; it simply had to produce evidence that 'raise[d] a genuine issue of fact as to whether it discriminated against Hays and Brown. *Burdine,* 450 U.S. at 254-255, 101 S. Ct. at 1094-1095. (38a-39a).

Burdine deals with evidence, not warnings about the impact of that evidence. Petitioners complain that they could have refuted such evidence as pretextural if they had been warned of its effect. (Petition, pp. 60-62). There was no mystery about the testimony summarized by the court of appeals above, and if petitioners failed to comprehend and react to that evidence at trial, we respectfully suggest that that was an error of counsel, not of the fifth circuit or the trial court.

Petitioners attempt to escape that conclusion by taking the position "the decision of the fifth circuit is squarely inconsistent with the decision of the court of appeals in *Lanphear v. Prokop,* 703 F.2d 1311 (D.C. Cir. 1983)." (Petition, p. 63). This is a "red herring." The egregious fact situation in *Lanphear* has nothing in common with the issues in *Bernard.* In *Lanphear,* the entire case and the subsequent appeal was tried by the employer on the

basis that "poor performance" was the sole reason for the employment action taken. *Id.* at 1315-1316. For reasons apparently known only to the district court, it went on a frolic and detour and entered judgment for the employer on the ground that the employer wanted "new faces and wanted to remove most if not all of the incumbents." *Id.* at 1316. The court of appeals observed that the evidence not only showed this ground had no causal connection with the employment action taken but further was "never put forward as a justification by the MSPB either before this court or below. In fact, the MSPB has expressly disavowed it . . ." *Id.*[19]

There is simply no parallel here. There was never any misrepresentation as to Gulf's position on this issue. There was no reliance on other grounds that would have misled petitioners. Gulf did not either present a "moving target" or "conceal the target altogether." *Id.* Petitioners simply failed to prudently react to the evidence.

The conclusion is inescapable that *Bernard* is consistent with *Burdine* and that the purported "conflict" with *Lanphear* is an illusion.

CONCLUSION

The petition for writ of certiorari should be denied.

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19. While the *Lanphear* court did not expressly so state, the more orthodox holding would have been to find that the district court's operative finding was clearly erroneous which the court apparently did by implication. *See Id.* at 1316.

Respectfully submitted,

WILLIAM G. DUCK
G. ALAN KRAMER*
MARSHA A. PENN
Chevron Companies
P. O. Box 3725
Houston, TX 77253-3725
(713) 754-3314

Counsel for Gulf Oil Corporation

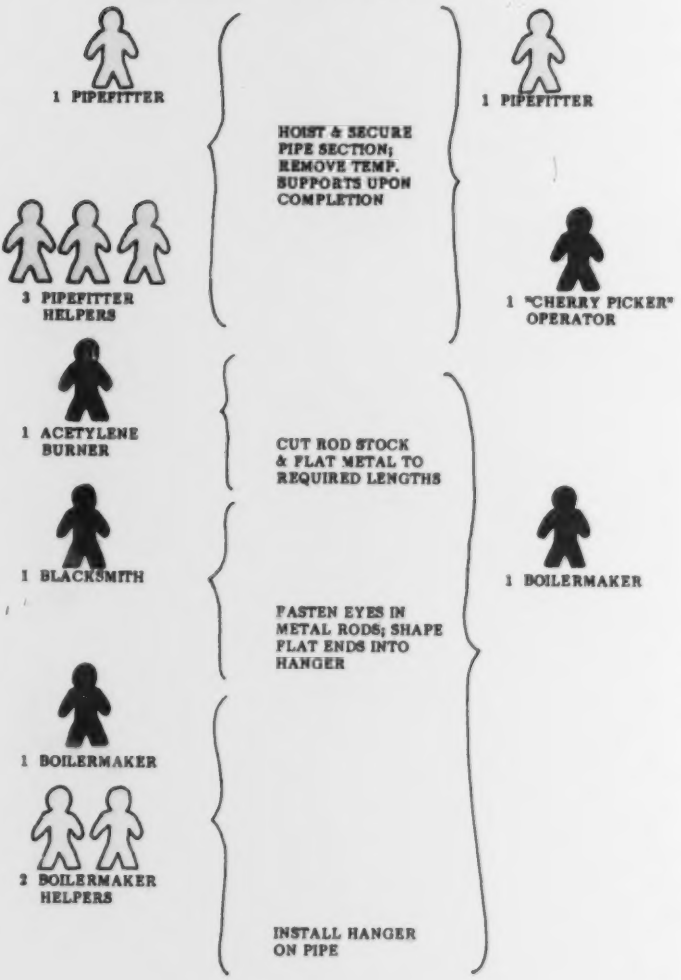
*Attorney of Record

CARL A. PARKER
CHRIS PARKS
One Plaza Square
Port Arthur, TX 77640
(409) 985-8814

Counsel for Oil, Chemical and Atomic Workers International Union Local No. 4-23

APPENDIX

CREW REQUIRED TO INSTALL A SECTION OF 4-INCH PIPE IN AN OVERHEAD PIPE RACK BEFORE AND AFTER STIPULATION 29


1 PIPEFITTER
3 PIPEFITTER HELPERS
HOIST & SECURE PIPE SECTION; REMOVE TEMP. SUPPORTS UPON COMPLETION
1 PIPEFITTER
1 "CHERRY PICKER" OPERATOR
1 ACETYLENE BURNER
CUT ROD STOCK & FLAT METAL TO REQUIRED LENGTHS
1 BLACKSMITH
1 BOILERMAKER
FASTEN EYES IN METAL RODS; SHAPE FLAT ENDS INTO HANGER
1 BOILERMAKER
2 BOILERMAKER HELPERS
INSTALL HANGER ON PIPE

TOTAL CREW NEEDED

DEFENDANT'S EXHIBIT 88